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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1652 and
77-1654

FEDERAL ENERGY REGULATORY COMMISSION
Petitioner,

v.

SHELL OIL COMPANY, ET AL.
Respondent

AND

CONSUMER FEDERATION OF AMERICA,
ENERGY POLICY TASK FORCE
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

BRIEF OF ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Action Alliance of Senior Citizens of Greater Philadelphia (hereinafter, "Action Alliance") moves for leave to file the attached brief *amicus curiae* in the above captioned case. The consent to file the same was refused by counsel for Shell Oil Company thus necessitating this motion.

ARGUMENT

I. The Federal Energy Regulatory Commission Must Address the Problems of Economic Hardship Thrust Upon Consumers During the Current Gas Shortage by Enforcing the Certificated Delivery Obligations of Gas Producers

Rapidly increasing gas utility prices have been and will continue to be especially burdensome to elderly and low-income consumers in Pennsylvania. Said consumers pay a greater percentage of their incomes for gas service than do the affluent[1] and are least able to pay the perennial rate increases passed to them through fuel clauses by gas distribution companies. It should be understood that the escalating cost of gas service is due in large part to the current gas shortage.[2] The Federal Energy Regulatory Commission must address this specific problem by enforcing the certificated delivery obligations of gas producers.

It is noteworthy that by year end 1973, there were thirteen major interstate pipeline companies that were curtailing gas distribution utilities. This trend has continued to the present for many utilities. The Federal Power Commission (FPC)[3] addressed the above situation initially in the 1966-70 period when the supply problem first became evident. Specifically, the FPC approved steps toward sys-

[1] Dawn Day, *American Energy Consumer,* Ballinger Press (1976).

[2] Gas distribution companies in the face of curtailments by pipeline suppliers have no choice but to seek alternative sources of gas supply. Unfortunately, to accomplish this end increased costs to the customer are necessarily incurred. See discussion *infra,* f.n. 6.

[3] The Federal Power Commission was the predecessor of the Federal Energy Regulatory Commission (FERC).

tem expansion including increased sales volumes to many pipeline companies. The expansion of these systems facilitated the flow of gas to residential, commercial and industrial customers.[4]

In addition, during the years 1970 and 1971, the Federal Power Commission: (1) enacted favorable price ceilings to encourage exploration, (2) adopted various rule changes to facilitate pipeline investment and gas exploration, (3) permitted short-term producer sales to encourage dedication of reserves to the interstate market and, (4) required pipeline companies to file curtailment plans to foster the equitable allocation of short supplies.[5]

The above initial steps have not proven to be sufficient to mitigate the adverse economic impact of the current gas shortage, however. *The major challenge that faces the Federal Energy Regulatory Commission (FERC) at present is assuring the fulfillment of existing producer delivery obligations and devising new measures to allocate limited supplies among many classes of customers.*

The impact of the current gas shortage on local economies is significant in many respects and must be mentioned here. First, because of dwindling inventories of liquefied natural gas in storage tanks, local gas distribution companies have to seek alternative sources of gas supply. Many times this means negotiating emergency gas purchases from other pipeline systems at a premium price.[6] Alternatively, it can

[4] Federal Power Commission, National Gas Survey, Vol. I, p. 115 (1975).

[5] *Id.* at 116.

[6] The direct testimony of Joseph G. Horan of Philadelphia Gas Works in July 1977, Philadelphia Gas Commission hearings depicts the volatility of gas supply that leads to curtailments in many in-

mean the production of oil gas, carburetted water gas or synthetic natural gas (SNG).[7] Again, all the alternatives raised here are expensive processes and costs for the same are passed to consumers.[8] Second, because of inadequate supplies, distribution companies will in many instances forego providing seasonal sales to industry during summer months. That is, most procurements of flowing gas are needed for the winter period and are liquefied for storage.[9]

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stances. It is noteworthy that in the 1976-1977 winter PGW's delivery entitlement of natural gas was temporarily reduced by 88,584 Mcf per day as a result of supply shortages: *Id.* at 10.

> Q. Earlier in your testimony you alluded to the volatility of the natural gas supply picture; can you cite an example of this volatility?
>
> A. The 1976-77 Budget, prepared in June of 1976, included a winter period flowing natural gas supply of approximately 36,500,000 Mcf (Thousand cubic feet), storage gas of 5,500,000 Mcf, no emergency purchases, and 4,100,000 Mcf, of LNG, for a total natural gas supply of 46,100,000 Mcf. In November 1976 the then current projection included a winter period flowing natural gas supply of 35,300,000 Mcf, storage gas of 6,000,000 Mcf, 2,000,000 Mcf of emergency purchases, 3,900,000 Mcf of LNG, for a total natural gas supply of 47,200,000 Mcf, an increase of 1,100,000 Mcf occasioned solely by PGW being able to offset a 1,300,000 Mcf decrease in flowing supply by the acquisition of an additional storage volume and PGW's ability to obtain a commitment from one of its pipeline suppliers to purchase 2,000,000 Mcf of emergency gas for PGW's account. It should be noted that although PGW's natural gas supply increased slightly, the increased cost of emergency and storage gas increased PGW's expenses by a disproportionate amount. *Id.* at 9-10.

[7] *Id.* at 16-18.

[8] Philadelphia Gas Commission Hearings, May 19, 1977, Tr. 5-8.

[9] Philadelphia Gas Commission Hearings, July 26, 1977, Tr. 435.

The loss of sales represents a loss of revenue making winter sales more expensive. Third, because of the critical gas shortage in severe winters, many industrial customers' service is curtailed causing loss of employment. This is particularly a crisis at a time when unemployment levels are already high.

Consumers here do not only address the pocketbook issue of higher rates which they can ill afford. Also, they voice vehement concern in regard to the burdens placed on industry as a result of the gas shortage. The specter of continued industrial curtailments mentioned above is a widespread occurrence. Philadelphia Gas Works has experienced reductions in its anticipated supply going into numerous past winter heating seasons.[10] Industrial curtailments naturally followed.[11] The experience of gas distribution companies across Pennsylvania was and is much the same. The Governor's Energy Council in Pennsylvania has outlined the problems created for large industrial customers by the gas shortage:

> Natural gas that is curtailed creates two direct impacts upon large gas consumers and [in] the geographic regions where they operate. One can be generically described as the impact of logistic problems of acquiring, transporting, storing and utilizing the alternate fuels. The other is the incremental cost of purchasing the alternative fuels. This section of the report examines these incremental costs and the amount of alternate fuels known to be required.
>
> These are not, however, the only impacts of alternate fuel usage. Other important impacts are very real and troublesome, even though less direct. Among these are the lost employment, diminished income, reduced purchasing power, and lower tax revenues that occur because alter-

[10] Philadelphia Gas Commission Hearings, July 19, 1977, Tr. 71.

[11] Philadelphia Gas Works, Proposed Change in Rates, p. 3 (1977).

nate fuels are not available or because the costs of alternate fuels raise product prices to non-competitive levels. Then there are the costs of designing and purchasing fuel storage and other combustion and heat transfer equipment to utilize alternate fuels.[12]

The Governor's Energy Council further states that there are many industrial customers who have no alternative fuel to secure in the event of curtailment. These customers are particularly vulnerable to the gas shortage and their employees are one class of apparent victims.[13]

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[12] Governor's Energy Council Commonwealth of Pennsylvania, Employment and Economic Impacts of Gas Shortages in Specific Counties and Industries of Pennsylvania, p. 24 (1977).

[13] The Governor's Energy Council report reveals the following statistics in regard to possible job dislocation as a result of the gas shortage in Pennsylvania:

1976/1977 HEATING SEASON PROJECTIONS
EMPLOYMENT BY LARGE CURTAILED CONSUMERS

County-specific Employment by Consumers Who:

a) Have No Alternate Fuel (Code 40)
b) Require No Alternate Fuel (Code 30)

Name of County	Total Employment by Large Curtailed Gas Consumers in the Specific County	Employment by Gas Consumers Who Do Not Have Alternate Fuel* (Code 40)	Employment by Gas Consumers Who Do Not Need Alternate Fuel* (Code 30)
Adams	948		
Allegheny	25685	2246	5755
Armstrong	315		
Beaver	20676	10623	3565
Berks	8899	76	
Bucks	10381		
Butler	376	341	
Cambria	60		60
Carbon	1396		1396
Centre	2245	1363	
Chester	8338	4600	4600
Clarion	409		

Name of County	Total Employment by Large Curtailed Gas Consumers in the Specific County	Employment by Gas Consumers Who Do Not Have Alternate Fuel* (Code 40)	Employment by Gas Consumers Who Do Not Need Alternate Fuel* (Code 30)
Clearfield	628	379	350
Clinton	46	46	
Columbia	1949	815	
Crawford	5630	2908	
Cumberland	1964		
Dauphin	7340		
Delaware	2915		
Elk	2982		
Erie	14987	534	
Fayette	1338		
Franklin	93		
Huntington	1198	860	
Jefferson	168	168	
Lackawanna	3383		471
Lancaster	10114		
Lawrence	3803		1609
Lebanon	2300		
Luzerne	1883	352	
Lycoming	525		
McKean	1041		
Mercer	9260	3135	
Mifflin	2037		
Montgomery	10716		1163
Northampton	14583		
Northumberland	2494		
Schuylkill	11202		
Union	100		
Venango	2204	1832	
Warren	2479		
Washington	5028	38	1588
Westmoreland	5044		1386
Wyoming	2647		
York	7847		5479
Total	209661	30286	27422

*For some portion of their curtailment. *Id.* at 2.

The question now becomes what can the FERC do to prevent the adverse economic impacts announced above. To be sure, it is firmly established that the primary aim of the Natural Gas Act is to "protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The Act's critical charge to the Commission includes the power to grant, deny and enforce certificates of public convenience and necessity, 15 U.S.C. § 717f. This Court has termed the certificate powers of the Commission as the "heart" of the Natural Gas Act. In *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388 (1957) the Court specifically states:

> . . . The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any "proposed service, sale, operation, construction extension, or acquisition . . . will be required by the present or future public convenience and necessity," § 7(e), 15 U.S.C. § 717(e), and that all rates and charges "made, demanded, or received" shall be "just and reasonable,"§4, 15 U.S.C. §717 (c). The Act prohibits such movements unless and until the Commission issues a certificate of public convenience and necessity therefor, § 7(c), 15 U.S.C. § 717(c). Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.

Further, the primacy of the certificate over private contractual rights has been repeatedly recognized by this Court. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 152 (1960); *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170 (1960).

In light of the above, the Commission's retreat from enforcing the certificate responsibilities of gas producers to

arrive at some vague and unworkable "prudent operator" standard premised on a contractual concept, is wholly unjustified. Moreover, such an abrogation of authority as announced in its Orders 539 A and B contravenes the thrust and meaning of the Natural Gas Act as construed by this Court. *Federal Power Commission* v. *Hope Natural Gas Co., supra.* It is also worthy of note that the end result of the Commission's Orders 539 A and B would be to grant gas producers virtually unregulated control over the deliverability of natural gas. Such result is unconscionable particularly in this time of crisis.

Consumers here ask not that the Commission immerse itself in the areas of production and gathering of natural gas, but rather that gas producers be held to their certificated responsibilities as opposed to such producer's unfettered (i.e., unregulated) discretion. This Court has dealt with similar problems under the Act in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 632. There, the Court opined that federal authority should govern where otherwise a given problem would escape effective regulation:

> . . . The Natural Gas Act of 1938 granted FPC broad powers "to protect consumers against exploitation at the hands of natural gas companies." *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610, 88 L Ed 333, 349 64 S Ct 281 *Corp.*, 365 U.S. 1, 19, 5 L Ed 2d 377, 389, 81 S Ct. 435 (1944). See *FPC* v. *Transcontinental Gas Pipe Line* Corp., 365 U.S. 1, 19, 5L Ed 2d 377, 389, 81 S. Ct 435 (1961); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 147 4 L Ed 2d 1623, 1631, 80 S Ct 1392 (1960). To that end, Congress "meant to create a comprehensive and effective regulatory scheme," *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U.S. 507, 520, 92 L Ed 128, 139, 68 S Ct. 190 (1947), of dual state and federal authority. Although federal jurisdiction was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the States, so that there

would be no "gaps" for private interests to subvert the public welfare. This congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and 'when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a "no man's land" will be created. Compare *Guss* v. *Utah Labor Board,* 353, U.S. 1 [1 L Ed 2d 601, 77 S Ct 598]. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area, and, if we find that it cannot, then we are impelled to decide that federal authority governs." *FPC* v. *Transcontinental Gas Pipe Line Corp., supra,* at 19-20, 5 L Ed 2d at 390.

It is abundantly clear that the Congressional intendment here was to create a comprehensive and effective regulatory scheme. This means perforce that problems such as exist in the instant context should not "slip through the cracks" of the regulatory framework. Consumers submit that the decision of the Fifth Circuit below casts a pall over the authority of the Commission to implement an enforcement policy and must be reversed. Said decision fails to adequately recognize or address, the issue of the necessary powers of the Commission in regard to certificated "service" obligations. The economic consequences to consumers that would result from Commission inaction in the instant situation are indeed grave. In short, gas producers must be held to their certifiated obligations if consumers are to be provided adequate service and economic hardship is to be avoided.

CONCLUSION

For all the above reasons, the decision of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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